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Chapter 7

The Migration of the Book across Territorial Borders: Copyright Implications for Authors in the Digital Economy

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ABSTRACT

*This chapter deals with the copyright issues faced by authors once their books enter the digital sphere, as well as the difficulties associated with overseas publications of their books, from a territorial perspective. It examines whether territorial copyright borders still afford book authors effective copyright protection in the digital economy, and further, whether the culture of the book is being eroded through the prevalence of extra-territorial publications. Relevantly, this article examines the landmark US Supreme Court decision of *Kirtsaeng v Wiley and Sons, Inc.* and considers its likely future impact on the enforcement of territorial copyright by authors and publishers. Finally, the article concludes that territorial copyright borders have become blurred, difficult to enforce in view of recent precedent, and are ineffective in preserving authors' copyright and the cultural dimensions of their books.*

INTRODUCTION

It should be stated at the outset that there is no concept of 'international copyright', which will automatically protect authors' copyright globally. Instead, copyright protection is territorial in nature and relies on the laws of individual countries for protection in that country. For example, in the USA the 1976 *Copyright Act* (together with a number of other statutes) regulates copyright use; in Australia the *Copyright Act* of 1968 (as amended) applies.

Most countries, however, (including the USA and Australia) are members of international copyright treaties, namely the *Berne Convention for the Protection of Literary and Artistic Works* (1971) where

copyright works are defined as ‘literary and artistic works’ (Article 2(1), 102). Under this treaty authors receive recognition for their foreign rights under the ‘national treatment’ requirement, which provides that a qualifying ‘foreign work’ must receive the same protection as a ‘local work’ [Article 7(8)]. Thus member States’ copyright laws should have certain ‘minimum standards’ of copyright protection to comply.

In practice, however, it has become apparent that digital publishing and global book sales have eroded these principles and have impacted on authors’ ability to protect and monetise their copyright internationally. In dealing with the migration of the book across territorial borders this article considers two aspects of the migration process:

First, it discusses the impact of electronic publishing or the digitalisation of the book across borders and what this means to authors in relation to their copyright. Whilst these advances have positively impacted on the availability and accessibility of books, and the creation of increased publishing opportunities for authors, there have also been corresponding negative consequences. Problem areas for authors have included pirating of their work on the internet through unauthorised copying, as well as a lack of knowledge on digital publishing and copyright protections on the internet.

Secondly, the issue of extra-territorial print publications – another area of book migration – is examined in relation to authors’ copyright, as traditional publishing also faces cross-border issues which cannot always be readily resolved. This global trend in publishing may lead to territorial copyright infringements. One increasing problem faced by Australian authors and publishers is the issue of unlawful parallel importing, which is difficult to police, especially in relation to digital copies. Parallel importing restrictions apply in the USA, Australia, Canada and the UK, but in reality these provisions are often breached by:

- Wholesalers or discounters who import illegally printed copies of books from the Far East into Australia and sell books at discounted prices: In these instances, authors don’t benefit from royalties as printing typically takes place in third world countries without regard to copyright. These books are often text books with poor quality printing and binding.
- Where books are lawfully published for an overseas market, and are then imported back into the country in breach of parallel import restrictions, or sold online across territorial borders at cut-rate prices: Again authors don’t benefit from royalties and these books are sold in competition with local publishers, who suffer losses as a result.

In Australia the issue of the sale of books on the internet has not been addressed in Court but the landmark US case of *Kirtsaeng v John Wiley & Sons* (2013) could have a far-reaching impact on authors and local publishers in the US, and potentially worldwide. In this case Kirtsaeng purchased text books from Thailand and then resold them on eBay to students in the US. The Court held that US copyright owners may not prevent importation and reselling of copyrighted content lawfully sold abroad, due to the application of the ‘first sale doctrine’. This case, discussed in more depth below, is a clear illustration that the availability of books online and cross-border selling may affect the application of territorial copyright, essentially rendering it inoperative in practice.

This article aims to provide insights on these issues by including references to research conducted with a purposive sample of published Australian authors, which examines authors’ views on these concerns from a ‘grassroots’ perspective. A brief synopsis of the methodology applied in this research follows below.

The Research Component and Methodology

A national online survey of published Australian authors (Cantatore, 2011) investigated the perceptions of authors on the dissemination of written work on the internet and the effects of digitalization on authors' copyright, amongst other issues. Responses were obtained from 156 authors, including fiction, non-fiction and academic authors. Additionally, 17 in-depth interviews with a range of authors, as well as additional interviews with small and large publishers, provided further qualitative insights into these issues. The methodology incorporated qualitative interviews, as well as qualitative and quantitative information obtained through the online survey. Approximately one third of the surveyed authors were full-time authors and the balance part-time

A Multi-Method Approach

A multi-method approach, characterized by a combination of qualitative and quantitative research methods, was employed. In this process the use of multiple methods or triangulation (Denzin and Lincoln, 2005) assisted with an in-depth investigation of the research issues. In-depth face-to-face interviews with a number of authors, underpinned by qualitative data obtained through online survey questionnaires, distributed through the *Australian Society of Authors* (ASA) and Writers' Centers throughout Australia, formed the nucleus of the research. This information was supplemented by primary documents such as legislation and publishing contracts, a comprehensive literature review and background research on legislative and publishing issues.

The Denzin and Lincoln (2005) view of the qualitative researcher being described as 'bricoleur and quilt maker', a person who assembles images into montages (a method of editing cinematic images), using a variety of methods, strategies and empirical materials (p. 4) was a relevant consideration in structuring the research. The assembling of authors' viewpoints through in-depth interviews and online surveys, together with legal research, literature review and economic considerations, resembled such a 'quilt' as envisaged by these authors. This viewpoint also supported the idea of 'purposive sampling', as described by Patton (2002).

Three important factors in particular merited consideration, described by Gray, Williamson, Karp and Dalphin (2007) as: 'the type of information to be gathered, the resources available for research and the access to individuals, groups and institutions' (p. 43). These factors were taken into account in both stages of the research model, and more particularly, in the construct of purposeful sampling, as proposed by Patton (2002) and discussed below.

Purposeful Sampling

The strategy described by Patton (2002) as 'purposeful sampling' (p. 45) has also been referred to as 'purposive sampling' (Stake, 2004, p. 451). Stake explains 'purposive sampling' as follows: 'For qualitative fieldwork, we draw a purposive sample, building in variety and acknowledging opportunities for intensive study' (p. 451). Patton regards such sampling as 'information rich and illuminative', offering insight about the phenomenon studied rather than empirical generalisation from a sample to a population (p. 40). In comparing the differences between 'qualitative purposeful sampling' and 'statistical probability sampling', he describes purposeful sampling as follows: 'Qualitative enquiry typically

focuses on a relatively small sample... selected purposefully to permit enquiry into and understanding of a phenomenon *in depth*' (pp. 234-235).

The type of purposeful sampling used in this research can best be described as 'maximum variation sampling' as envisaged by Patton (2002). This type of sampling aims to capture and describe central themes that cut across a great deal of variation. It relies on the identification of common patterns in the diversity of responses. In the case of authors and copyright, it would aim to recognise common themes emerging from the results of a diverse group of authors from different age groups, backgrounds and geographical areas.

Purposive sampling was implemented in two stages, namely: the first sample of face to face interviews with 17 published authors, including 'elite' interviews - as perceived by Marshall and Rossman (2010, p. 155) - who comprised more than half of the sample. A second sample of online surveys was completed by a larger group of 156 participants from the ranks of published Australian authors. The researcher considered elite authors as those who have been published over an extended period of time and have made continued contributions to the development of the book industry. Because of this naturalistic approach, it was envisaged that such a sample would provide an authentic and relevant result.

Purposive sampling through the combination of surveys and interviews allowed for a more goal-oriented investigation and for more introspection and reflection on the part of the researcher. The emphasis was not purely on data collection, but on the assimilation and critical analysis of research results, bearing in mind Brannen's cautionary remarks against the risks inherent in qualitative research:

For example, the current turn to reflexivity in qualitative research in respect of the focus upon the researcher risks neglecting research participants. By contrast ...there is the opposite risk whereby researchers attribute to their research participants a monopoly over meaning. There is a danger of downplaying the interpretive role of the researcher (Brannen, 2004, p. 313).

With these caveats in mind, care was taken to identify and acknowledge the viewpoints of participants in the in-depth interviews where they were specific on certain issues. Furthermore, the online survey provided a means of utilising a larger sample group to obtain qualitative data against which the subjective interviewee comments and observations could be examined.

Scope of the Research

Two main groups of participants were identified in the research - full time authors and part time authors, with only data obtained from published authors utilised. In addition, three publishers (two small and one large/mainstream) and a publishing contract consultant were interviewed to provide background information and a further perspective on the research issues.

Certain sources, especially those regarded as 'elite interviews', could provide valuable information on the research issues, such as author Frank Moorhouse, who had played an instrumental part in copyright protection for Australian authors. Marshall & Rossman (2010) note some of the advantages of elite interviews as their possible familiarity with legal and organisational structures and their broad views on the development of policy fields (pp. 155-156). It was thus envisaged that the findings of the research would be strengthened by the inclusion of a purposive sample of such high-profile or 'elite' participants with a high level of knowledge on the subject matter, as proposed by Patton (2002).

In respect of the online survey all responses were anonymous, with no identifying features other than broad demographic information, such as the respondent's state of residence, age, type of writing engaged in and income. The non-identifying approach was selected as the underlying basis for this strategy as it

was aimed at encouraging prospective respondents to participate in the survey due to the assurance of anonymity (Buchanan, 2004, p. 146). The scope of the research therefore sought to include a number of different 'types' of authors, who could be classified as full time or part time writers, and also according to profession (for example fiction writer, non-fiction writer, academic writer, etc.).

The Two Stages of Data Collection

As explained above, the research process was executed in two stages, a first stage which consisted of limited open-ended face to face interviews with 17 authors, three publishers and a publishing contract consultant, followed by a second stage, which comprised an online survey which was distributed through the Australian Society of Authors (ASA), the professional association for Australia's literary creators, and various writers' centres nationally. This approach allowed for the collection of rich qualitative data through the in-depth interviews (Denzin & Lincoln, 2005, p. 12), together with a wider scope of data collection through the online survey.

An interview guide was used to facilitate the in-depth interviews, in line with Patton's suggestion that the use of an interview guide leaves the interviewer 'free to explore, probe and ask questions that will elucidate and illuminate the particular subject.' According to Patton (2002) 'it provides for better use of the limited time available for an interview; interviewing is more systemic and comprehensive and the issues to be explored are delineated in advance' (p. 343).

The open-ended structure of the interviews with this sample group provided the first valuable source of qualitative data and informed the second stage of the research by providing more insight into the research issues. Furthermore, the scope of the research questions evolved through the process of interviewing as key trends and changes in the industry became more evident and synthesized as the research progressed.

The second research stage allowed for a more focused approach by utilizing an online web-based survey questionnaire, consisting of limited open-ended and multiple choice questions. Significantly, the online survey provided a purposive sample of data on the research issues, larger in scope than the face to face interviews. It was envisaged that the use of this additional instrument would increase the validity of the findings, as proposed by Marshall & Rossman (2010, pp. 104-105) and as favoured by Patton (2002, p. 306). Web-based surveys have become more widely used in the last ten years and are regarded as inexpensive, with a short response time and able to achieve satisfying response rates compared to questionnaires delivered by 'classical' mail (Ganassali, 2008, p. 21). Web-based surveys are also regarded as having lower respondent errors and increasing the completeness of response (McDonald & Stewart Adam, 2003, p. 85).

Fontana and Frey (2005) recognized the fact that computer surveys were becoming more widely used as part of the data gathering process and stated that developments in computer-assisted interviewing had called into question the division between traditional modes of interviewing such as the survey interview and the mail survey (p. 703) They observed that:

...today we are really looking at a continuum of data-collecting methods rather than clearly divided methods; in fact... many surveys today incorporate a variety of data-gathering methods driven by concerns such as time constraints, financial demands, and other practical elements (p. 703).

Consequently, it was envisaged that an online survey promoted by the ASA (a national organization with approximately 3,000 members from all Australian States and Territories) would obtain pertinent

responses from a wide geographic spectrum of authors, implemented by using a web-based survey mechanism such as 'Survey Monkey', a user-friendly research tool commonly used by academics.

The substantive content of the survey, entitled '*Authors, Copyright and the Digital Evolution*' consisted of seven pages, which included '*Demographic information*', '*Your views on copyright*', '*The existing copyright framework*', '*The publishing industry*' and '*Publishing on the internet*.' The questions were presented in three formats, which included limited open-ended questions, allowing for a paragraph of comment per subject. The second format used was that of multiple questions, where the subject matter lent itself to such a format. The third type of questions used was 'likert' scale choices, employed to scale participants' responses in relation to the questionnaire topics. The survey instrument allowed for 'filtering', which enabled the elimination of unpublished author responses to focus on results related to published authors. It further provided a function for cross tabulating results. This facility also enabled comparison of the results of part time and full time authors.

Limitations

There were certain inherent limitations in the techniques employed during the two stages, due to practical considerations associated with in-depth interviews and the procurement of online survey respondents. The limited number of author interviews conducted (17 out of 40 requests) was reflective of the limitations of this method, such as unavailability, a reluctance to be interviewed, expense considerations and time factors. However, the purposive sample nevertheless allowed for in-depth discussion and provided insight into authors' subjective viewpoints on the research issues as proposed by Patton (2002, p. 45).

Whilst the online survey had the advantage of being cost effective and accessible to a large group of authors, there were limitations to a web-based approach. The total number of 177 responses obtained in the online survey represented a relatively small group in view of the number of possible respondents. Possible respondents included members of the ASA (3,000) and an unknown number of members of the various Writers' Centres that provided links to the survey. These response figures were reflective of the limitations imposed by the online survey method. One significant limitation was the fact that responses were limited to users of the internet. This created a risk of non-response bias, which presented a threat to making inferences from the data obtained (Bech & Kristensen, 2009, p. 3). As a result, the data was utilized as targeted qualitative, rather than quantitative data, providing the researcher with insight into the research questions rather than the ability to draw generalisations.

Limitations on the part of respondents may include: a lack of online facilities (although it would be presumed that most authors would have access to the internet), a lack of interest in the subject matter, apathy on the issue of copyright, a lack of understanding of the issues involved resulting in a reluctance to participate, a lack of motivation, a lack of time and a general reluctance to complete surveys. However, in the context of similar surveys, such as the national *Queensland University of Technology Survey on Academic Authorship, Publishing Agreements and Open access* (Austin, Heffernan & David, 2008) - where emails with survey links were sent directly to 27,385 academics, and only 509 responses were received - it appears that the level of interest displayed by authors in the present survey was not unusual.

However, whilst these limitations are acknowledged, based on the purposeful sampling strategy with the inherent purpose of 'in-depth understanding' as identified by Patton (2002, p. 230), the results of the survey provided sufficient data for meaningful analysis and discussion within the framework of this paper. The findings are thus incorporated into this discussion to provide some meaningful insights from authors' viewpoints on the effect of books being sold across territorial borders, whether in digital or

print form (Cantatore, 2012). In the discussion below, authors' and publishers' comments were made within the context of this research, unless otherwise indicated.

A Global Milieu: Digital Copyright Challenges

The concept of a 'heavenly library' where books resided in digital form was discussed in some depth by Sherman Young (2007) in his book *The book is dead, long live the book*. This was by no means a new thought – the idea was previously framed as a 'heavenly jukebox' by Goldstein (2003) in his book where he predicted 'a digital repository of books, movies and music available on demand' (p. 184).

Young (2007) subsequently extended this idea of a 'heavenly jukebox' by relating music to books and imagined the 'heavenly library' 'as the world's collection of books available in an instant.' (p. 15). This concept, according to Young, had a number of advantages over printed books, including more flexibility and ease of publishing for publishers, greater accessibility for readers, environmental advantages, lower costs and portability. As early as 1993, Rawlins had enumerated the advantages of e-books as being 'cheap, long lasting, easily copied, quickly acquired, easily searched and portable in bulk' (1993, p. 475).

The research findings showed that these advantages were recognized by many authors who saw the digital market as a new way to connect with readers and transform the book supply chain. Full time authors in particular appreciate the growing significance of the internet market place and the advantages of making their books available in digital form. During the course of this research, over a period of 3-4 years, e-reading technology has also advanced rapidly and most of the interviewees and survey participants were conscious of the inroads made into traditional publishing by devices such as iPhones, iPads, Kindle, etc. New devices are constantly being introduced into the marketplace, and the concept of a digital environment where all books, music and films are available at the click of a button has become a reasonable expectation rather than a potential promise.

So what are the perceived disadvantages of a 'heavenly library'? Apart from considerations that book lovers may no longer have a library filled with printed books due to the smart economics of buying e-books online, and that we may see a demise of the traditional book culture as a result, authors raised concerns about digital copyright protection.

Although authors have obtained new publishing and distribution opportunities in the decentralised publishing sphere of the internet, copyright enforcement has become more onerous as a result of electronic publishing. In a recent paper delivered by Richard Hooper CBE (2012) in Sydney he recognised that there was a global 'battlefield' between supporters of the notion that the internet should be free on the one hand, and the creative industries wanting to protect their intellectual property and copyright on the other. The Hooper Report included a feasibility study for the *Digital Copyright Exchange*, a key recommendation of the *Hargreaves Report* (2011).

The complexity of copyright law and licencing has been a stumbling block for many authors in asserting their copyright online. The Australian survey findings showed that nearly 80 per cent of all respondents were concerned about their digital copyright. Most of the author comments related to theft of work on electronic media or 'online piracy'. Some authors cited instances of copyright breaches on their internet publications without any apparent solutions.

It is significant that, although they acknowledged that illegal online copying was a real concern for them as the current copyright structure did not seem to address the problem adequately, more than half of the survey respondents admitted to doing nothing to protect their copyright online. Several respondents specifically cited a lack of knowledge on e-book copyright as a problem and voiced concerns about a

lack of time and funds to pursue copyright breaches on the internet. Whilst these concerns were common amongst authors, equally prevalent was the lack of any action taken with regard to copyright breaches. In addition, publishers did not provide a shield for authors against online copyright infringement, with most authors and publishers apparently accepting the inevitability of copyright infringements on the internet.

Those authors who took protective steps employed different measures to protect and regulate the use of their online copyright material. Significantly, less than one-fifth of survey respondents used digital rights management (DRM) to prevent the copying of their work. Some expressed reservations about the use of DRM and described it as 'a barrier' to readers buying their books. Whilst most respondents stated that it was 'impossible' to protect their copyright online, just under a tenth favoured flexible licensing models - such as the Creative Commons - which recognise authors' moral rights and provide licensing options in the Australian *Copyright Act 1968* (section 89).

Although the Creative Commons had been in operation for over 10 years, slightly less than half of survey respondents admitted that they were not familiar with the concept, while approximately 36 per cent expressed support for the Creative Commons. Considering the nature of the respondents (published authors) one may have expected a greater awareness of this licensing option. It is noted however, that interviewees who supported the Creative Commons were generally also bloggers, who had more internet knowledge than others who had not previously published work online. It appears that this provides an opportunity for the Creative Commons concept to be better marketed to this group of professionals who would be a logical stakeholder group. However, a significant perceived drawback of the Creative Commons licensing scheme is that it does not prescribe licensing fees or financial remuneration for participants due to its voluntary character.

As an alternative protective measure, nearly 36 per cent of the survey respondents stated that they posted warnings on their websites or on the creative work itself, and 13 per cent used 'other means' of copyright protection such as relying on their publishers and taking note of daily Google alerts advising of illegal file sharing sites.

Significantly, as some authors pointed out, the problem with protecting online copyright was that it was usually not commercially viable to pursue offenders in the case of a breach. It was noted that international copyright was a grey area and that legal advice would not necessarily help to resolve practical issues. The findings showed that the prohibitive costs of protecting their copyright and litigating overseas was a stumbling block for most Australian authors, which was evidenced by the absence of Australian copyright litigation on books.

An issue of specific concern to authors was how the digital economy impacted on their existing territorial copyright, the dilution of which seemed inevitable. It was suggested by some authors that it would be short-sighted for countries to attempt territorial changes - such as the suggested lifting of parallel import restrictions - when publishing agreements were already being impacted by digital technologies. Others saw no reason for dividing territories up geographically where digital rights were concerned, arguing that consumers would expect to have access to digital contents worldwide, irrespective of where they lived. The findings also showed that the possibility of self-publication had effectively removed traditional territorial barriers for authors.

It is evident that most publishers have already come to the realisation that they need to acquire worldwide digital rights when they purchase a book and that authors and organisations such as the ASA are becoming acutely aware of the importance of world digital rights (Loukakis 2010, p.4). Although the Productivity Commission study on parallel importing (2009) raised authors' awareness of the dilemma of territorial copyright - which relies on the enforcement of copyright law as a national prerogative - the

digital sphere has made it increasingly difficult to cling to existing copyright models. In Australia, the Harper Panel (Competition Policy Review, 2015) reviewing competition law and policy recommended abolition of the remaining restrictions on parallel importation. The Government subsequently announced support for removing parallel import restrictions on books.

Territorial copyright protection is in a state of flux, as is evidenced by the inevitable encroachment of online booksellers, such as Amazon, on these rights by selling books across international borders. Significantly, the Australian *Copyright Act* 1968 (section 44F) provides that there are no restrictions on importation of an electronic literary work, except that it must be a 'non-infringing copy' (i.e. made lawfully in the country of origin), thus significantly affording no parallel import protection on digital books.

Sally Collings, Australian author and publisher, expressed the view that the territorialism that had existed in publishing for decades, would become a non-issue as digital books became more prevalent (Cantatore 2012). This viewpoint was supported by author and self-publisher John Kelly, who said that the possibility of self-publication has effectively removed traditional territorial barriers. In an online article '*Publish and be damned* (2009)' he stated that self-publishers 'have access to a world-wide market by submitting their book to Google Books and Amazon and Lulu's websites, all available for a start-up cost of less than \$100.00.' On the issue of the deregulation of publishing and parallel importing, he said:

The very nature of competition has been turned on its head and the once revered retail bookstore is staring its use-by date down the barrel just like the neighbourhood hardware store. But it isn't the threat of de-regulation that places it in this invidious position. The internet already has! One can debate the positive and negative impacts of this development, but it has nothing to do with government regulation.

Kelly's observations were pertinent as he raised two issues, not only that of self-publication and the greater freedom it allowed, but also the fact that many books were bought online today across territorial copyright borders, rendering government regulation secondary to practical realities.

These authors' and publishers' comments support the argument that the internet has expanded the boundaries of copyright protection and that current legislative structures may not offer authors the necessary protection in the digital economy. Several authors mentioned the need for new copyright solutions, although the findings showed divergent views on the subject. While some suggested that authors should be more proactive in their approach to copyright, others were of the view that the existing copyright structure was insufficiently suited to copyright use in the digital domain. Most authors showed an awareness of the challenges facing their profession in the expanding literary sphere in the digital domain but - perhaps not surprisingly - not many solutions were being offered. Authors who were most optimistic about the future of online publishing acknowledged the limitations of DRM technology, yet there appeared to be few other viable income producing copyright options available.

In a fairly recent report, the Australian Book Industry Strategy Group (BISG) (2011) recognised the problems associated with protection of digital copyright and the necessity for reform. They recommended that the Australian Law Reform Commission (ALRC) should 'consult directly with the book industry through its author and publishers associations when it next reviews copyright issues' (p. 68). Furthermore, they suggested that the Government should work with internet industries, to adopt a binding industry code on copyright infringement by internet service providers, to protect online copyright. These recommendations are commendable, but would require not only a focused intention by the ALRC and Government to alleviate current digital copyright concerns, but also practical and enforceable

measures, such as the punitive sanctions and anti-piracy copyright education campaign proposed by the ASA (Loukakis, 2011, p. 6).

In more recent copyright developments in Australia, the ALRC has released a Discussion Paper on *Copyright in the Digital Economy* (2013), calling for submissions from stakeholders. It considers several options for reform, set out in the Terms of Reference, one of which is the possible recognition of 'fair use' of copyright material in the *Copyright Act* 1968 (as opposed to the current closed list of permitted purposes for 'fair dealing'), which will allow for expanded transformative use (2012, p. 24). Such an inclusion will align the Australian copyright approach with US provisions for 'fair use', and will create a wider range of copyright exceptions, especially relevant on the internet.

The collection of royalties internationally continues to be a problem. A number of authors voiced the concern that copyright measures and royalty schemes based in Australia did not sufficiently address the issue of loss of revenue from overseas sources, such as sales on the internet and copyright infringements which occurred overseas. This concern is being fuelled by the blurring of territorial copyright zones as a result of new media structures and the expanding use of electronic devices. It is evident that these problems can only exacerbate as online publishing becomes more prevalent and territorial borders become less defined.

Surprisingly, the findings revealed that many authors did not favour a hard line enforcement of electronic copyright, which may account for their lack of preventative action. There were those who saw the internet as a marketing opportunity and employed 'soft' licensing practices such as the Creative Commons, and others who were happy to provide their creative work not only DRM free, but also free of charge. The findings also showed an increased awareness of the necessity for changing business models and a need to embrace the digital market, as proprietary branded electronic readers become more widespread.

It has also become apparent that licensing terms and conditions are becoming paramount in the digital milieu, especially in relation to e-books, such as Kindle sales. This trend reflects the observations of John and Reid (2011), that owners' and users' copying rights are now being determined more by individual licenses and less by provisions in copyright law than in the past. It also supports Young's contention that copyright requires a re-assessment in the digital environment (2007, pp. 158-159). At the very least, publishers and authors must now apply close scrutiny to the terms and conditions of international electronic licensing agreements such as Google and Kindle agreements, to avoid the power of the individual—both author and localised publisher—sliding backward as global publishing giants advance forward.

The Demise of Territorial Copyright

It has been noted above that the *Berne Convention* provides guidelines on the treatment of copyright in extra-territorial works, requiring that foreign works should enjoy the same protection as local works. These guidelines are implemented by various national copyright protections such as the USA *Copyright Act* 1976, the UK Copyright, Designs and Patents Act 1988 and the Australian *Copyright Act* 1968. Restrictions on the parallel importation of books have regulated the importation and sale of printed books, and are enforced in these countries. However, internet publications and sales of printed books in the digital economy have limited the usefulness of these measures, as seen in the recent US *Kirtsaeng* (2013) case, discussed below.

The Parallel Import Debate in Australia

In Australia, current parallel importation provisions allow a restriction on importation of printed copyright material into Australia, which provide Australian publishers with a 30-day window to distribute a local version of a book (and 90 days to resupply) before competing overseas publishers may distribute the same product in Australia (*Copyright Act 1968* (Cth) ss 102 and 112A). The US *Copyright Act 1976* (s 104) provides a similar protection for copyright works of national origin.

The Australian parallel import provisions were under review between 2006-2009, with lobbyists advocating the removal of these restrictive provisions in the legislation. The Australian Productivity Commission conducted an investigation into the nature, role and importance of intangibles, including intellectual property, to Australia's economic performance, as well as the effect of copyright restrictions on the parallel importation of books. Two hundred and sixty-eight (268) submissions were put forward to the Productivity Commission during 2008 by authors on the issue of parallel importing (Productivity Commission Report, 2009).

In their submissions to the Productivity Commission, many authors provided examples of how they felt the current parallel import restrictions (PIRs) had benefited them, or how the potential removal of the restrictions might affect them. Nick Earls argued that, allowing parallel imports would 'undermine authors' incomes', 'destroy the local market', and present 'a serious disincentive towards Australian publishers publishing new Australian books' (Submission, 2008, pp. 8-9). Garth Nix pointed out that territorial copyright provided publishers with certainty, which encouraged them to invest in Australian authors and Australian books (Submission, 2008, p. 7). Without that certainty there would be less incentive to invest in Australian books, and consequently the opportunities for Australian authors would be fewer. In addition, Thomas Keneally foresaw the gradual demise of the Australian publishing industry, cautioning: 'Both authors and literary agents, particularly those whose interest is explicitly Australian, would be facing shrinking resources and contracts' (Submission, 2008, pp. 4-5.) Many authors also stated that, in the absence of parallel import restrictions, they would lose control over the sales of their books. Once the rights to books were sold overseas, authors would no longer be able to control which edition of the book was sold in Australia, potentially impacting on their returns. Furthermore, some new or undiscovered authors could find it more difficult to gain attention in an open market (Productivity Commission Submissions 2008). Despite the 268 author submissions (in addition to those of publishers and booksellers), against the proposed abolition of the parallel import restrictions, the Productivity Commission recommended that the Government repeal Australia's parallel import restrictions for books (Productivity Commission Report, 2009).

However, the final result of the investigation was that the Government, under pressure from authors and publishers, rejected the recommendations of the Productivity Commission to phase out parallel import control, and instead retained the status quo. Whilst the brief euphoria in the midst of Australian publishers and authors was well founded, it has since become evident that these protective provisions in s 102 of the Australian *Copyright Act* would not protect authors and publishers from infringements occurring in the digital sphere. As noted above, the Australian *Copyright Act* does not place any restrictions on importation of electronic literary works - except that they must be 'non-infringing copies'. It also remains to be seen what the effect of the current review (ALRC, 2013) of the Act will be. To be adequately informed in making recommendations, significant research by the ALRC and broad consultation with the Australian community and copyright creators will be required (Loukakis, 2012). The final report of the ALRC is due on 30 November 2013.

During their interviews, authors and publishers participating in the research stated specific instances in which they had encountered copyright problems. A mainstream publisher explained the difficulties in enforcing copyright internationally as follows: 'The thing that is probably the most confusing here is the way that book rights are transacted internationally. You can have an originating publisher in one country with rights to sell in another country.' She saw this as a major problem in the Google book scanning case [*The Authors Guild et al v Google, Inc*, (2009)], where the American edition of an Australian publication may have been scanned by Google, but the Australian metadata applied. This caused confusion about who the actual rights holder of such a book was and, consequently, made it difficult to enforce copyright. The Google settlement falls outside the scope of this article; however, the issues raised by Google's unauthorised book scanning initiative are inextricably linked to the operation and inadequacy of existing copyright structures.

Another publisher observed that, even though Australia applied parallel import restrictions, authors routinely experienced problems with illegal parallel importation of their books from countries such as China or India. Where illegal copies were being sold by reputable booksellers, whether online or in the retail market, the problem could be addressed by sending a letter requesting them to cease and desist from selling the book, but it was difficult to control offshore operators and internet marketers. She explained that authors did not benefit financially from remainder deals that are sold at cost or below cost, as contracts generally provide that the author does not benefit once the book is sold by the publisher for less than the printing costs. This means that if a book by an Australian author is remaindered in the USA and sold into Australia at remainder cost, the author does not receive anything, even if the book is sold at full price in Australia.

Frank Moorhouse recognised further problems with regard to the collection of royalties internationally. 'It is difficult to police copyright zones in English speaking countries', he said, referring to the problems of international collecting agencies. He ascribed this difficulty to the difference in the law and ethos of different English speaking countries, which was evidenced in the 'tricks, fraud and danger' inherent in protecting copyright internationally. These problems were less evident in compact cultural groups, such as the Danish, for example, who were confined to one country. For this reason, collecting agencies in Scandinavian countries were more successful than English speaking, European countries.

Nick Earls also experienced a problem with his copyright when he discovered that copies of his novel *ZigZag Street* were being sold on remainder tables outside newsagents in Australia, in breach of copyright provisions. In this instance, his UK publisher had overstocked and copies of the novel found their way to a remainder house in the UK, where they were bundled up and sent to Australia with other books, in breach of his territorial rights. He recognised, however, that it was difficult to prevent this from happening or to stop the newsagents from selling the books, as they had bought the books in good faith, thinking that they were legally entitled to sell them.

These comments accord with the concern voiced by a number of authors: that copyright measures and royalty schemes based in Australia do not sufficiently address the issue of loss of revenue from overseas sources, such as sales on the internet and copyright infringements which occur overseas. This concern is being fuelled by a number of issues: the blurring of territorial copyright zones as a result of new media structures (and the expanding use of electronic devices) and actions by organisations such as Google, who actively defy traditional copyright expectations.

In Australia - as in the case of the UK and US - territorial rights remain in existence. Although the ASA has cautioned authors to ensure that these rights remain protected in the digital domain (Loukakis, 2010) it is clear that authors will find this advice more and more difficult to implement, considering the

global reach of the online book market, which has made it unlikely for any publisher to accept a book without securing the world rights. This trend points to a dilution of the value of territorial rights in the digital economy, which supports Young's (2007) contention that the industry requires a new copyright infrastructure (pp. 158-159).

Additionally, the realities of applying the 'first sale doctrine' to books imported from another country and then sold in the country of origin, as was the case in *Kirtsaeng*, puts paid to the idea that territorial rights will necessarily protect US rights holders from the impact of cross-border sales.

The Kirtsaeng Case

In the recent US case of *Kirtsaeng v John Wiley & Sons* (2013), Kirtsaeng, a Cornell University student, purchased mathematics text books from his home country Thailand (with the assistance of friends) and then resold them on eBay to students in the US. The texts were English foreign editions and only authorised for sale in Europe, Asia, Africa and the Middle East. The issue to be decided was how s 602 (which prohibits the importation of works into the US without the copyright owner's permission) and s 109 (dealing with the first sale doctrine) of the *Copyright Act* applied to copies of books made and legally acquired abroad, and then imported into the US. The Supreme Court held by a 6-3 majority that US copyright owners may not prevent importation and reselling of copyrighted content lawfully sold abroad, due to the application of the 'first sale doctrine' (2013, p. 2). The effect of the first sale doctrine (also referred to as an 'exhaustion of rights'), is that the publisher's copyright is exhausted once a book is lawfully purchased. The majority opinion in this case stated from the outset that the first sale doctrine applied to lawfully made copyright works, even when made in a foreign country (2013, p. 2).

It is significant that the Court read the Act as imposing no geographical limitation. This approach was in contrast to the Lower Court decision in the case *John Wiley & Sons, Inc. v Kirtsaeng* (2011). In the earlier decision the Court had found in favour of Wiley, who relied on s 602 of the Act and argued that Kirtsaeng could not rely on the first sale doctrine (s 109) as it only applied to works manufactured in the US.

The 6-3 division in the Supreme Court decision is reflective of the controversy surrounding the interpretation and application of these two provisions in the Act. Previously, in the *Costco Wholesale* case (2010) the Court was divided 4-4 on this issue, and in the earlier decision *Quality King* (1998) the Court held that s 109 limited the scope of s 602, leaving open the question whether US copyright owners could retain control over the importation of copies manufactured and sold abroad (p. 135).

In her dissenting judgment in *Kirtsaeng* Justice Ginsburg criticised the reasoning of the majority, stating that the majority's interpretation of the *Copyright Act* was 'at odds with Congress' aim to protect copyright owners against the unauthorized importation of low-priced, foreign made copies of their copyrighted works (2013, p.10).' She also expressed the viewpoint that 'the Court embrace(d) an international-exhaustion rule that could benefit US consumers but would likely disadvantage foreign holders of US copyrights (2013, p. 28).'

The Supreme Court in *Kirtsaeng* thus resolved the case in favour of permitting parallel importation by relying on the first sale doctrine. Despite the argument that this interpretation favours consumers by providing them with cheaper options, the flipside is that rights holders in written work could be disadvantaged by the erosion of their territorial rights. Principally, this decision illustrates how easily territorial copyright provisions may be circumvented, and the potential far-reaching impact on authors and publishers globally in the future.

CONCLUSION: FUTURE SOLUTIONS

In conclusion, it has become evident that the traditional application of territorial copyright and parallel import restrictions no longer serve to protect copyright holders, due to the impact of digital sales and also due the application of the ‘first sale doctrine’ in the US. For now, parallel import restrictions apply to printed books, but will they become obsolete in the digital age? It is apparent that new copyright solutions are required, which require authors and publishers to embrace digital technology, improve their knowledge of online publishing and apply alternative creative publishing models. As internet publishing and cross-border sales increase, new business models are needed. We have seen that DRM has been criticised as being too restrictive, yet for many authors and publishers its use has been instrumental in protecting their copyright. On the internet a variety of licencing solutions have been proposed, including models such as the Creative Commons and various ‘pay-per-view’ schemes, the most widely used of which is possibly the licensing of *Kindle* books by Amazon.

More recently, the implementation of a ‘Digital Copyright Exchange’ has been investigated and recommended by the Hooper Report in the UK (2012). This system takes the form of an automated licensing machine on a web portal, which allows the user to agree on a price and use of the content, in order to obtain a licence and download the content. It is proposed that this exchange will be part of a ‘Copyright Hub’ which will serve an educational function, introduce a voluntary Rights Registry and provide access to the digital copyright exchange. Whilst the system will predominantly accommodate low transaction amounts associated with music downloads, it will also serve the book industry by providing licensing options for digital publications (Hooper, 2012, p. 30).

Savikas (2013), CEO of *Safari Books Online*, has described the benefits of running subscription-based e-book service models similar to the cloud entertainment subscription services. Services such as *Spotify*, *Rdio* and *Netflix* are widely used by consumers, and whether or not this will be feasible for digital books remains to be seen. Clearly future solutions for authors and publishers in the book industry will need to be flexible and internationally focussed. In order to effectively monetise their creative efforts, authors will need to be pro-active, embrace the realities of the marketplace and revise their views of what constitutes a ‘book sale’ in the digital economy.

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